NO. 41740-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN D. KNIGHT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAY'S HARBOR COUNTY

The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to establish that appellant knowingly possessed child pornography.

2. The trial court's suppression of critical testimony regarding the state's key witness's bias, denied Mr. Knight his right to cross examination.

Issue Presented on Appeal

1. Was the evidence insufficient evidence to establish that appellant knowingly possessed child pornography?

2. Did the trial court's suppression of critical testimony regarding the state's witness' bias deny Mr. Knight his right to cross-examine witnesses?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Mr. Knight was charged by amended information with possession of depictions of minor engaged in sexually explicit conduct contrary to RCW 9.68A.070. CP 28-29. Following a jury trial, the honorable judge David Edwards presiding, Knight was convicted as charged. CP 123. This timely appeal follows. CP 145-146.

2. SUBSTANTIVE FACTS

Mathew Owens, a friend of Brian Knight who sometimes spent the night at Knight's, told the Elwha police chief that Knight had shown him a picture of a 5-6 year old girl with her top off. RP 4-17. The photo was only visible for a few seconds, but Owen's testified that he thought he saw other small thumbnail images of children that were disturbing. RP 15-18, 22-23. Knight closed the photographs immediately. Id.

According to Owens, Knight kicked Owens out of Knight's apartment after viewing the photographs. RP 18. Owens had no place to stay with his girlfriend and decided to go to the Elway police to inform them of the images he thought he saw on Knight's computer. RP 20. According to Owens, Knight said he could erase anything on his computer. RP 19.

The trial court in an order of limine precluded Knight from informing the jury that he kicked Owens out of his apartment because Owens stole prescription narcotics from him and sold them to a minor. RP 10. Knight was also precluded from informing the jury that Owens' threatened to kill him. RP 8-9.

The police seized 7 hard drives from Knight's apartment. RP 27-36. The police chief interviewed Knight who told the chief that his

computers were new and had nothing on the, and if something was found, the information would have come from the police. RP 37. After the police told Knight they had found images on his computer, Knight told the police that "technically there was nothing on my computer, so if it were [sic] there, you put it there....because the drives are brand new." RP 38. The police did not know that Knight worked on computers for a living. RP 43.

None of the hard drives had any markings indicating that they belonged to Knight. RP 46. Tim Doughty, a Washington State Patrol high tech crimes investigator analyzed Knight's hard drives. RP 50-62. Doughty discussed 17 different images retrieved from the seized hard drives. Id.

Doughty also retrieved a registry that showed most recently viewed material on a media player on Knight's hard drive. RP 63. The file path indicated that Knight was the user but the content was not retrievable. RP 64. The titles were " pedophilia, uncle undresses and rapes 12 year old niece for real, preten [sic] and quality porn, key word cum, and KNRYOU", prom, thirteen year old sister, eat, cum, illegal preteen underage Lolita, kiddie, child, incest, little girl, rape, anal, extreme". Doughty indicated these were video format files. RP

65. Doughty indicated these files came from "emule" a file sharing software program that also has legitimate uses. RP 66, 74.

Even though Doughty was able to retrieve still images he had to use a very expensive $4000 forensic program that was not on knight's computer. RP 77-78. None of the images were retrievable from Knights computer without this software. The images were in "unallocated space" which is space on the hard drive for deleted material. RP 76-77, 107-108. Dr. William Hutton, a pediatrician, testified that the images were of naked prepubescent children and their genitals. RP 79-86.

Doughty indicated that it was impossible to determine who downloaded the material or when the down loads took place. RP 70-71. Doughty admitted that it was possible for a person to download legal material and be unaware that an illegal file was piggybacked to the legal file. RP 73-74.

Barry Walden a forensic computer expert agreed that it was impossible to determine who or when the illegal material was downloaded onto the hard drives and that a hacker could have accessed Knight's computer without his knowledge. RP 96-103. Walden also agreed that the images were not recoverable without

expensive forensic tools. RP 95.

C. ARGUMENTS

1. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT KNOWING POSSESSION OF CHILD PORNOGRAPPHY.

Mr. Knight challenges the sufficiency of evidence that he knowingly possessed depictions of minor engaged in sexually explicit conduct. RCW 9.68A.070: Possession of depictions of minor engaged in sexually explicit conduct provides in relevant part:

> (1)(a) A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9. 68A.011(4) (a) through (e).

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier,* 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence" and all reasonable inferences therefrom. *State v.*

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The reviewing Court will reverse a conviction for insufficient evidence when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. *State v. Smith,* 155 Wn.2d 496, 501, 120 P.3d 559 (2005). In evaluating the sufficiency of the evidence, circumstantial and direct evidence are entitled to the same consideration. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

To convict Knight of possession of child pornography, the State had to prove beyond a reasonable doubt that knight knowingly possessed images depicting a minor in sexually explicit conduct. RCW 9.68A.070.

In *State v. Williams*, 135 Wn. App. 915, 146 P.3d 481 (2006), the SCC staff discovered that a SCC inmate (Williams) had a hard drive in his room, with a photograph of a minor female engaged in a sexually explicit act with a male. The evidence did not indicate when the file had last been accessed, but there was no dispute that Williams alone had access to this computer and the file was available to him alone. *Williams*, 135 Wn. app. at 926-927. Based on these facts, the Court concluded that "a reasonable trier of fact could have

found beyond a reasonable doubt that Williams knew that the illegal photograph was stored on his computer." *Id.*

Williams is distinguishable on several grounds. First, the images in Knight's case were not accessible to Knight and second, Owens had access to Knight's computers.

Possession may be actual or constructive and need not be exclusive. *State v. Turner,* 103 Wn. App. 515, 520-521, 13 P.3d 234 (2000). Constructive possession of an object can be based on evidence of dominion and control over the place where it was found. *Turner*, 103 Wn. App. at 520-21. Proximity to an object may support dominion and control, but proximity alone does not establish constructive possession. *Turner,* 103 Wn. App. at 521.

The Court's look to the totality of the circumstances to determine whether there is substantial evidence from which the jury could reasonably infer constructive possession. *State v. Partin*, 88 Wn.2d 988, 906, 567 P.2d 1136 (1977); *Turner*, 103 Wn. App. at 521.

In *Turner*, the defendant had dominion and control over the vehicle where the contraband (rifle) was found, he knew of the contraband, had access to it but denied that it was his. The Court, emphasizing the fact that Turner owned the car and admitted to

knowing of the rifle under the car seat, held that these facts were sufficient to find dominion and control over the vehicle and constructive possession of the rifle. *Turner*, 524.

Turner is distinguishable on the grounds that Turner, unlike Knight admitted to knowing the rifle was in his car in plain view, and admitted dominion and control over the car. In Knight's case the contraband was in unallocated space on various hard drives and jump drives that were inaccessible to the average computer user without expensive software not found on Knight's computer. Knight denied knowing the contraband was on the computers and Knight works on others' computers and had a number of hard drives in his room.

In *State v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001), the Court held that the defendant did not constructively possess contraband (guns) that was found in a room that contained some of his clothing, bank books and other books and articles featuring himself and others. The Court held that the evidence presented including testimony that others had possession of the premises defeated the state's attempt to prove Alvarez's constructive possession notwithstanding his personal possessions in the room. *Alvarez*, 105 Wn. App. at 222-223.

Alvarez is most closely on point. In Knight's case as in *Alvarez,* the state established that the computers were inside knight's room; that one of the computer's was Knight's work computer and that Knight had shown Owens how to use the computer. RP 15-16. Owens denied using the computer without Knight's permission. RP 26. But no witness could determine who downloaded the files or when the files were downloaded. And Owens was only certain that he saw a photo of a little girl without her shirt. This evidence is insufficient to establish beyond a reasonable doubt that Knight knowingly possessed child pornography. As in *Alvarez*, in Knight's case, the evidence that Owens had access to the computer defeated the state's attempt to prove Knight had constructive possession of the 7 hard drives. *Alvarez*, 105 Wn. App. at 222-223.

2. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE A CRITICAL WITNESS TO DEMONSTRATE BIAS.

The trial court denied Knight's motion in limine to present evidence of Mathew Owens' bias. RP 8-11. Mr. Knight sought to introduce the fact that Owens threatened to kill him. Id. The trial court ruled that the evidence was not relevant. Id.

Violations of the state and federal confrontation clauses are reviewed de novo. *State v. Medina,* 112 Wn.App. 40, 48, 48 P.3d 1005 (2002). The Sixth Amendment to the United States Constitution and Constitution article I, section 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *Delaware v. Van Arsdall,* 475 U.S. 673, 678-79, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Davis v. Alaska,* 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Russell,* 125 Wn.2d 24, 73, 882 P.2d 747 (1994).

The constitutional right to confront witnesses applies when: (1) the evidence sought to be admitted is relevant and (2) the defendant's right to introduce relevant evidence when balanced against the State's interest in precluding evidence that would be overly prejudicial so as to disrupt the fairness of the fact-finding process. *See Washington v. Texas,* 388 U.S. 14, 16, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Hudlow,* 99 Wn.2d 1, 15, 659 P.2d 514 (1983); *State v. Gallegos,* 65 Wn.App. 230, 236–37, 828 P.2d 37 (1992).

A defendant is entitled to confront the witnesses against him with bias evidence when the evidence is at least minimally relevant. *State v. Hudlow,* 99 Wn.2d 1, 16, 659 P.2d 514 (1983). "Bias includes that which exists *at the time of trial,* for the very purpose of

impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy *while the witness was testifying.*" *State v. Fisher*, 165 Wn.2d 727, 752-753, 202 P.3d 937 (2009); quoting, *State v. Dolan,* 118 Wn.App. 323, 327–28, 73 P.3d 1011 (2003). The defendant is granted more "latitude to expose the bias of a key witness" *Fisher*, 165 Wn.2d at 752-753, citing, *State v. Darden,* 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). The Court reviews decisions regarding the admission of evidence for abuse of discretion. Id.

The trial court has the authority to determine the extent to which defense counsel may inquire into the witness' alleged bias "based on concerns about, among other things, such as harassment and prejudice. *Fisher*, 165 Wn.2d at 752, quoting, V*an Arsdall,* 475 U.S. at 679.

Bias of a witness is subject to cross-examination at trial, and is always relevant to discredit the witness and affect the weight of the testimony. *Davis,* 415 U.S. at 316. In *Davis,* the State's primary witness was a juvenile who lived near where a stolen safe was found. The witness was on probation after being found guilty of burglary, but the defendant was not permitted to cross-examine the witness about

his probation status or his prior convictions. The Supreme Court of the United States overruled the Alaska Supreme Court which held that despite the limitations on cross-examination, the defendant was permitted to sufficiently develop the issue of bias.

The United States Supreme Court held that "counsel was unable to make a record from which to argue *why* [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Davis,* 415 U.S. at 318. The court held that "[t]he accuracy and truthfulness of [the witness's] testimony were key elements in the State's case against petitioner." *Davis,* 415 U.S. at 317.

As in *Davis,* Owen's bias against Knight, his threats to kill and his stealing prescription narcotics from Knight were relevant to his credibility and bias. This "why" explaining the nature of the bias was critical to demonstrating Owen's bias. The trial court's refusal to permit cross examination on these matters denied Knight his constitutional right to confront witnesses. *Davis,* 415 U.S. at 317.

In *State v. Brooks,* 25 Wn.App. 550, 552, 611 P.2d 1274 (1980), the Court held that a defendant has a right to put specific reasons motivating the witness' bias before the jury. *Brooks*, at 551–

52, 611 P.2d 1274. In *Fisher*, following *Brooks*, the Supreme Court upheld the trial court's ruling limiting the scope of cross examination of the defendant's wife who was not a key witness. The Supreme Court upheld the trial court because the trial court permitted the defense to elicit testimony regarding an acrimonious divorce and any "harbored ill will toward" the defendant. *Fisher*, 165 Wn.2d at 752-753. The Court in *Fisher* held that "Fisher's confrontation rights were not violated since the jury was apprised of the specific reasons why Ward's testimony might be biased." *Id.*

In Knight's case, Owens was a key witness. Although the trial court permitted Knight to elicit that Knight asked Owens to leave his apartment Knight was not permitted to ask why Owens was told to leave or about Owen's ill-will toward Knight, or his threats to kill Knight. RP 8-9; 20. Unlike in *Fisher*, Knight was denied his right to confront a key witness.

Constitutional error is presumed to be prejudicial and the State has the burden of proving the error was harmless. *State v. Guloy,* 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In determining whether constitutional error is harmless, Washington courts use the "overwhelming untainted evidence test" to decide whether it appears

beyond a reasonable doubt that a fact finder would have reached the same result in the absence of the error. *Guloy*, 104 Wn.2d at 425–26, 705 P.2d 1182.

In Knight's case, the error was not harmless because the untainted evidence was not overwhelming. The only evidence that Knight knowingly possessed child pornography came from Owens. Like the witness's testimony in *Davis,* Owen's testimony was "a crucial link in the proof ... of petitioner's act." *Davis,* 415 U.S. at 317. Owens' bias was relevant under *Davis*, and directly undermined his credibility. *Davis,* 415 U.S. at 316.

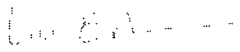
The trial court's suppressing this critical evidence denied Knight his right to confront and cross examine the witness in violation of the Sixth Amendment to the United States Constitution and Constitution article I, section 22; *Davis* 415 U.S. at 315; *Russell,* 125 Wn.2d at 73. For these reasons, this Court should reverse and remand for a new trial.

D. CONCLUSION

Brian Knight respectfully requests this Court reverse his conviction for insufficient evidence and dismiss with prejudice or in the alternative reverse and remand for a new trial.

DATED this 24th day of September 2011.

Respectfully submitted,



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